

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Requests for Refunds of	)	
Down Payments Made in Auction 35	)	WT Docket No. 02-276

**REPLY COMMENTS OF AT&T WIRELESS SERVICES, INC.**

AT&T Wireless Services, Inc. (“AWS”) hereby submits its reply comments on the *Public Notice* issued in the above-captioned proceeding.<sup>1/</sup> AWS confines its response to Nextel’s unabashedly self-interested proposal to preclude “entities with a substantial financial interest” in Auction 35 winning bidders<sup>2/</sup> that choose to “opt out” of the auction from acquiring the same spectrum in a subsequent auction or in the secondary market for a period of three years. In light of the unique circumstances of Auction 35, AWS strongly disagrees with Nextel’s contention that auction winners requesting voluntary dismissal of their applications should be penalized in any manner. Nextel’s belief, however, that the universe of auction winners should be expanded to include certain investors in winning bidders is completely unsupported by either policy or precedent, and its proposal would be impossible to implement in a nondiscriminatory manner.

As an initial matter, in arguing for a three-year ban on acquisition of this spectrum, Nextel fails to take into account the unique circumstances surrounding Auction 35. Notwithstanding Nextel’s attempt to draw an analogy to the Commission’s 1997 *Restructuring*

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<sup>1/</sup> Public Notice, *Commission Seeks Comment on Disposition of Down Payments and Pending Applications for Licenses Won During Auction No. 35 for Spectrum Formerly Licensed to NextWave Personal Communications, Inc., NextWave Power Partners, Inc. and Urban Comm – North Carolina, Inc.*, WT Docket No. 02-276, FCC 02-248 (rel. Sept. 12, 2002) (“*Public Notice*”).

*Order*, in which the Commission decided to prohibit entities controlling certain winning C block bidders from acquiring licenses in reacution for two years or in the secondary market, the situations could not be more different.<sup>3/</sup> The Auction 35 winners here are not licensees, and they have not sought debt relief because of an inability to make installment payments. Rather, the Auction 35 winners are applicants for licenses who have timely submitted their upfront and down payments and have waited almost two years for litigation beyond their control to resolve whether the Commission even has the right to award the licenses they bargained for.<sup>4/</sup>

As it stands now, under the D.C. Circuit Court of Appeals' ruling, NextWave holds the licenses at issue in this proceeding.<sup>5/</sup> Thus, although Nextel is correct that “[g]enerally speaking, amending bidders’ obligations after the close of an auction is anathema to a fair auction process,<sup>6/</sup> in this unique case, continuing to hold the winners to their bids – potentially for years – in the hope that the Commission might be able to prevail in its U.S. Supreme Court appeal, would do far more damage to the integrity and future success of the Commission’s spectrum auction program than releasing winners from their contingent liabilities expeditiously and without penalty. As the Progress & Freedom Foundation correctly notes, the on-going failure to deliver the licenses in a timely manner has “undermin[ed] the trust that is an essential component

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<sup>2/</sup> “Auction 35 winning bidders,” in the context of this pleading, is limited to those entities that won licenses formerly held by NextWave and Urban Comm.

<sup>3/</sup> *Amendment of the Commission’s Rules Regarding Installment Payment Financing for PCS Licensees*, 12 FCC Rcd 16,436, ¶ 37 (1996) (“*Restructuring Order*”), *on recon.* 13 FCC Rcd 8345 (1998), *aff’d*, *U.S. Airwaves Inc. v. FCC*, 232 F.3d 227 (D.C. Cir. 2000).

<sup>4/</sup> Nextel also fails to explain why it has chosen to propose a *three*-year prohibition on the acquisition of returned spectrum rather than the *two*-year ban the Commission applied in the *Restructuring Order*. *Id.*

<sup>5/</sup> *NextWave Personal Communications, Inc. v. FCC*, 254 F.3d 130 (D.C. Cir. 2001), *cert. granted* \_\_ U.S. \_\_, 70 U.S.L.W. 3317, 70 U.S.L.W. 3545, 70 U.S.L.W. 3351 (March 4, 2002) (Nos. 01-653, 01-657).

<sup>6/</sup> Nextel Comments at 5 (emphasis added).

of the free enterprise system. The Commission can best preserve the integrity of the auction process, therefore, by bringing the Auction 35 debacle to a swift and honorable conclusion.”<sup>7/</sup>

Nextel’s attempt to persuade the Commission to encompass winning bidders’ non-controlling investors within its proposed penalty scheme enjoys even less legal or policy support. Nextel entirely fails to explain how it would define “substantial financial investors” for these purposes. While it mentions Cingular and AWS by name, Nextel does not describe what criteria the Commission should use to distinguish between those two entities and the dozens of other parties that have equity or debt interests in Auction 35 winning bidders. “Control” obviously cannot be the test Nextel is looking for because, as Nextel well knows, the Commission already has concluded that AWS does not control the Auction 35 winner – Alaska Native Wireless – in which it has an equity interest.<sup>8/</sup> Nor would “amount of equity” be a reasonable way to choose which investors are to be barred from purchasing spectrum. Given the Commission’s decision to refrain from adopting minimum (or maximum) equity requirements for purposes of determining whether an investor’s assets and revenues should be “aggregated” with those of the party seeking to participate in “closed” bidding or take advantage of bidding credits for “open” licenses, it would be arbitrary, to say the least, to penalize investors *after the fact* based on their equity stakes in bidders.<sup>9/</sup>

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<sup>7/</sup> Progress & Freedom Foundation Comments at 5. Although the Foundation’s conclusions are sound, it mistakenly refers to AWS as a winner of Auction 35. *Id.* at 2. As noted below, AWS is an investor in winning bidder, Alaska Native Wireless; AWS was not a bidder itself in the auction and has not applied for any Auction 35 licenses.

<sup>8/</sup> *Applications of Alaska Native Wireless, L.L.C., File Nos. 0000364320 and 0000363827; Auction No. 35 - C & F Block Broadband PCS*, 17 FCC Rcd 4231 (2002).

<sup>9/</sup> *Id.* ¶ 17; see also *Amendment of Part 1 of the Commission’s Rules -- Competitive Bidding Procedures*, 15 FCC Rcd 15293, ¶ 65 (2000) (“We decline to adopt a minimum equity requirement for controlling interests because it is contrary to our goal of providing legitimate small businesses maximum flexibility in attracting passive financing.”); *Minnesota PCS Limited Partnership (Assignor), et. al.*, 17

If Nextel has any suggestion at all for how its proposed rule should be applied, it appears to be that the Commission should sanction only “the largest cellular providers in the United States” (*i.e.*, those with whom it competes on a nationwide basis).<sup>10/</sup> Nextel makes the absurd argument that the Commission should not provide cellular operators like Verizon Wireless, Cingular, and AWS with a regulatory windfall because they purportedly have “benefited financially from numerous Commission-granted regulatory windfalls” in the past.<sup>11/</sup> As examples of such benefits, Nextel lists “free spectrum” awarded through comparative hearings and lotteries in the early 1980s, a 1986 grant of 5 MHz of spectrum to all cellular providers, a 1988 decision to allow cellular operators to use digital technology, and a recent decision to sunset – in five years – the requirement that cellular operators continue to provide analog service.

Even if there were some merit to Nextel’s attempt to distinguish between parties that should and should not be penalized in the Auction 35 context by reference to previous regulatory benefits, the supposed advantages to cellular that it cites are dubious, at best. The comparative hearings and lotteries of the 1980s were not “windfalls” by any stretch of the imagination. Rather, those were the only methods of distributing licenses allowed under the Communications Act.<sup>12/</sup> Nextel’s argument is especially specious considering that its predecessors-in-interest

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FCC Rcd 126, ¶ 11 (2002); *C and F Block Broadband PCS Spectrum Auction Scheduled For December 12, 2000*, 15 FCC Rcd 19485, 19501 (2000).

<sup>10/</sup> See Nextel Comments at 12.

<sup>11/</sup> *Id.*

<sup>12/</sup> As Nextel knows, the Commission received auction authority in 1993. Thus, Nextel’s *current* argument in another proceeding that it deserves CMRS spectrum without an auction (or lottery or comparative hearing, for that matter) *does* amount to a request for an enormous regulatory windfall. See *Improving Public Safety Communications in the 800 MHz Band, Consolidating the 900 MHz Industrial/Land Transportation and Business Pool Channels*, WT Docket No. 02-55, Joint Reply Comments of Aeronautical Radio, Inc., the American Mobile Telecommunications Association, the American Petroleum Institute, the Association of American Railroads, the Association of Public Safety Communications Officials-International, Inc., the Forest Industries Telecommunications, the Industrial Telecommunications Association, Inc., the International Association of Chiefs of Police, the International

obtained virtually all of their licenses without having to bid for them. Indeed, the only 800 MHz CMRS licenses Nextel has acquired through FCC auctions were “overlay” SMR licenses, the bidding for which often was limited to Nextel, who, by virtue of its extensive 800 MHz holdings, was generally the only entity that practically could make use of the overlay spectrum.

Nor can the Commission’s 1988 ruling that cellular operators were permitted to use “alternative technological platforms” be considered a regulatory *benefit*. SMR providers, such as Nextel, and PCS licensees are not currently saddled with the restrictions applicable to cellular and have long been free to use whatever technology platforms suit their needs. In fact, in declining to eliminate the analog requirement last month, the Commission itself acknowledged the rule imposes a disparate burden on cellular licensees because it requires them “to incur operation and maintenance costs for two mobile telephony networks, . . . impedes spectral efficiency, . . . prevents cellular licensees from choosing to efficiently use their spectrum by installing an all-digital network and potentially providing additional advanced services, . . . [and] may result in certain carriers being capacity constrained.”<sup>13/</sup> Nextel’s argument that cellular providers are enjoying a windfall by virtue of the Commission’s recent decision to require them to wait five *more* years to be free of these *cellular-only* limitations and costs is simply ludicrous.

Nextel withdrew from Auction 35 in Round 13, long before any bidder knew what the ultimate spectrum prices would look like. Now Nextel urges the Commission to penalize not

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Association of Fire Chiefs, Inc. and International Municipal Signal Association, the Major Cities Chiefs Association, the Major County Sheriffs’ Association, the National Sheriffs’ Association, Nextel, the Personal Communications Industry Association, and the Taxicab, Limousine and Paratransit Association (“Consensus Proposal”) (filed Aug. 7, 2002) (seeking, among other things, spectrum in the 2 GHz band for Nextel). At a time in which CMRS licenses are distributed almost exclusively by competitive bidding, giving away spectrum to one party would be “anathema to a fair auction process.” *Cf.* Nextel Comments at 5.

<sup>13/</sup> *Year 2000 Biennial Regulatory Review – Amendment of Part 22 of the Commission’s Rules To Modify or Eliminate Outdated Rules Affecting the Cellular Radiotelephone Service and Other*

only the parties who stayed throughout the auction, participated in lengthy settlement discussions with NextWave, and waited almost two years without receiving the licenses they won, but also those entities that invested in the Auction 35 winners. Nextel's proposal should be seen for what it is – a blatant attempt to obtain an unwarranted regulatory advantage over its competitors. Accordingly, Nextel's proposal should be rejected without further consideration.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Angela Collins, hereby certify that on this 21st day of October 2002, copies of the foregoing Reply Comments of AT&T Wireless Services, Inc. were sent via electronic mail to the following:

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